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No. 71-1112

In the Supreme Court of the United States

OCTOBER TERM, 1971

BERNARD GRIZAFFI, ET AL., PETITIONERS

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER, APOLLO SAVINGS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners are contractors who obtained more than four million dollars in construction loans from the Apollo Savings and Loan Association, which subsequently went into receivership. Pursuant to Illinois law, the Commissioner of Savings and Loan Associations for the State of Illinois appointed the Federal Savings & Loan Insurance Corporation (FSLIC) as receiver of the Apollo Savings & Loan Association. FSLIC brought this action against the petitioners and certain former officers and directors of the association to recover damages for alleged acts of civil conspiracy, fraud and mismanagement.

464-035—72—1

The suit was filed in the United States District Court for the Northern District of Illinois while state liquidation proceedings were pending. The complaint charged the defendants with violating standards of conduct established in 18 U.S.C. 657 (misapplication of funds of an association insured by FSLIC), 18 U.S.C. 1001 (false statements to an agency of the United States), 18 U.S.C. 1006 (conflicts of interest within, and false statements to, an association insured by FSLIC), 18 U.S.C. 1008 (false statements to FSLIC), and the common law of Illinois.

The district court dismissed the complaint for lack of subject matter jurisdiction. *Katin* v. *Apollo Savings*, 318 F. Supp. 1055 (N.D. Ill.).[1] The court of appeals reversed, holding that FSLIC's claims as receiver established federal jurisdiction under 28 U.S.C. 1345 (Pet. App., pp. A1–A6).[2] That statute provides that "[e]xcept as otherwise provided by Act of Congress, the district court shall have original jurisdiction of all civil actions * * * commenced by the United States, or by any *agency* or officer thereof *expressly*

[1] The district court also held that the federal abstention doctrine required dismissal of FSLIC's complaint without prejudice to pending proceedings in state court. *Katin* v. *Apollo Savings*, 318 F. Supp. at 1061–1063. The court of appeals reversed, finding no basis for invoking the federal abstention doctrine (Pet. App., pp. A3–A6). Petitioners do not challenge the holding that abstention was improper. The complaint in *Katin* v. *Apollo Savings*, N.D. Ill., No. 68 C 808, a separate, earlier action consolidated with the instant case, was also dismissed. The plaintiffs in that case did not appeal.

[2] The court of appeals did not decide whether federal jurisdiction was established by FSLIC's claims in its capacity as successor to the rights of Apollo's depositors (Pet. App., p. A3 n.1).

authorized to sue by Act of Congress" [emphasis added]. The court of appeals determined that FSLIC qualified as a federal agency authorized to sue under 12 U.S.C. 1725(c)(4) and 12 U.S.C. 1730(k)(1).

Petitioners contend here, as they did below, that a proviso to 12 U.S.C. 1730(k)(1) precludes federal jurisdiction because FSLIC brought suit in its capacity as receiver for a state-chartered bank. The statute provides:

> Notwithstanding any other provisions of law, (A) the Corporation [FSLIC] shall be deemed to be an agency of the United States within the meaning of section 451 of Title 28; (B) any civil action, suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and (C) the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect: *Provided,* That any action, suit or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other

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[1] The term "agency" is defined in 28 U.S.C. 451 as including "any corporation in which the United States has a proprietary interest." 12 U.S.C. 1730(k)(1)(A) states that FSLIC "shall be deemed to be an agency of the United States" within the meaning of 28 U.S.C. 451. 12 U.S.C. 1725(c)(4) expressly authorizes the FSLIC "[t]o sue and be sued * * * in any court of competent jurisdiction in the United States * * *."

> legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States. * * *

The court of appeals held that the proviso in 12 U.S.C. 1730(k)(1) related solely to removal of suits commenced in state courts, which named FSLIC as a party, and that the proviso does not limit the jurisdiction conferred by 28 U.S.C. 1345 over "all civil actions * * * commenced by the United States, or any agency or officer thereof expressly authorized to sue by Act of Congress."

1. The decision of the court of appeals is correct, as a brief analysis of the statutory provisions relating to removal proceedings indicates. A party in an action in a state court may remove the action to a district court only in those cases in which the district court could have exercised original jurisdiction. 28 U.S.C. 1441. Where an agency such as FSLIC is named a party in a state proceeding and the matter in controversy does not "arise under the Constitution, laws, or treaties of the United States" or involves an amount less than $10,000, removal to a district court would not normally be possible (28 U.S.C. 1331). By providing that such actions "shall be deemed to arise under the laws of the United States" and that jurisdiction may be taken without regard to the amount in controversy, 12 U.S.C. 1730(k)(1) automatically

brings the proceedings within the provisions of 28 U.S.C. 1331.[4]

The proviso in 12 U.S.C. 1730(k)(1) merely creates an exception to this "automatic jurisdiction" rule by declaring that a proceeding in which FSLIC is a party solely in its capacity as a receiver of a state chartered institution shall "not be deemed to arise under the laws of the United States." The present case, however, involves a suit commenced by an agency of the United States and jurisdiction arises solely by virtue of that fact under 28 U.S.C. 1345.[5] There-

[4] 28 U.S.C. 1345 could not supply the jurisdictional predicate for removal in such a case because it is applicable only to suits "commenced by the United States or by any agency".

[5] *Freeling* v. *Sebring*, 296 F. 2d 244, 245 (C.A. 10), on which petitioners rely (Pet. 16), is not in conflict with the decision below. That case involved the construction of 12 U.S.C. 1819, Fourth, the analogous statute defining jurisdiction in cases involving the Federal Deposit Insurance Corporation. Unlike 12 U.S.C. 1730(k)(1)(A), the statute in *Freeling* did not contain a provision declaring the FDIC to be an "agency" of the United States, and jurisdiction, therefore, could not be predicated on 28 U.S.C. 1345. The Senate Report on 12 U.S.C. 1730(k)(1) expressly stated that clause (A) would "make clear that the Corporation is an agency of the United States for purposes of title 28 of the United States Code" and that there was no provision comparable to clause (A) in the analogous statutes relating to the Federal Deposit Insurance Corporation (12 U.S.C. 1819). S. Rep. 1482, 89th Cong., 2d Sess., p. 19. Petitioners' reliance on that portion of the Senate Report expressing concern for the preservation of the dual federal-state banking system, S. Rep. 1482, 89th Cong., 2d Sess., p. 7, is misplaced. That part of the report relates to 12 U.S.C. 1730(o), which provides that state supervisory authorities must be given an opportunity to remedy unsound state banking practices before FSLIC moved to correct such practices under 12 U.S.C. 1730 (c), (f)(1), or (g).

fore, even if the proviso applies to this case and the action is "not deemed to arise under the laws of the United States," the district court had jurisdiction under 28 U.S.C. 1345."

2. The proviso in 12 U.S.C. 1730(k)(1) has no application to the instant case even if it were otherwise applicable to defeat jurisdiction over a suit commenced by FSLIC in its capacity as a receiver of a State chartered institution. By its terms, the proviso apples only to a case where FSLIC is a party in a representative capacity and the case "involves only the rights or obligations of investors, creditors, stockholders, and such institution [on behalf of which the suit is brought] under *State law*" (emphasis added). The complaint in the present case does not involve "only" rights "under State law." The complaint charged petitioners with violation of four separate federal statutes in addition to the common law of Illinois. Since this case involves issues under federal law, the proviso cannot operate to defeat the jurisdiction of the district court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

APRIL 1972.

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[6] *Federal Savings & Loan Insurance Corp.* v. *Fielding*, 309 F. Supp. 1146 (D. Nev), which petitioners cite (Pet. 15), sustained jurisdiction over a suit brought by FSLIC. While there is some language in the opinion supporting petitioners' argument, it was not necessary to the decision.

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